BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court filed an opinion granting respondents' motion (52 Fed. Supp. 833; R., p. 96-97).

The opinions of the Circuit Court of Appeals for the Second Circuit are set forth in the record (p. 101-107).

Questions Presented, Statement, Etc.

The questions presented, statement of the case, and the specifications of errors relied upon are set forth in the petition.

ARGUMENT.

I.

Respondents were and are engaged in business in the state of New York making them subject to the service of process under Section 229 b, Civil Practice Act of the state of New York.

The petitioner in his complaint (R., p. 49-57) and in his affidavit in opposition to the motion in the District Court (R., p. 77-91) has shown that the respondents were engaged in business in the state of New York, that the respondents and their agent Epstein had a place of business in the city of New York, that Epstein's authority included taking orders, quoting prices, purchasing merchandise for the respondents and making contracts for the respondents, that orders taken by Epstein were binding and not subject

to approval by respondents, that Epstein was authorized to and actually did receive payments for respondents, that Epstein and respondents' other representatives were engaged in a continuous course of business in the solicitation of orders from many firms in the state of New York, and that the respondents were engaged in a course of business in the state of New York and not in a single transaction.

By reason thereof, respondents are subject to the service of process in the state of New York, pursuant to the provisions of Section 229 b, Civil Practice Act of the state of New York.

International Harvester Company v. *Kentucky*, 234 U. S. 579.

The decision of the United States Circuit Court of Appeals for the Second Circuit in the case at bar is in conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit rendered in *Alaska Commercial Co.* v. *Debney*, 144 Fed. 1 (1906).

In *Alaska Commercial Co.* v. *Debney, supra*, a judgment obtained after service of process pursuant to a statute similar to the statute involved herein, was held to be valid even though the transaction forming the basis of the suit did not arise within the jurisdiction where the action was brought.

In the case at bar, the causes of action set forth in the complaint had their origin in business transacted within the city and state of New York.

The decision of the Circuit Court in the case at bar conflicts with the decision of the New York State Court of Appeals in *Tauza* v. *The Susquehanna Coal Company*, 220 N. Y. 259, in which on similar facts it was held that the defendant was engaged in business within the state of New York.

II.

Respondents are subject to the provisions of Section 229 b, Civil Practice Act of the State of New York in an action arising out of a business transaction conducted in the State of New York—even if they are not actively engaged in business in New York State.

Section 229 b, Civil Practice Act of the state of New York, was enacted by the New York State Legislature in 1940 (C. 99, Laws of 1940 of New York State, as amended by C. 455, Laws of 1941 of New York State), upon the report after study and recommendation by the Law Revision Commission of the state of New York (see Law Revision Commission, Report, Recommendations and Studies, 1940). The Law Revision Commission of the state of New York is an official agency of the state (Chapter 597 of the Laws of 1934 of the state of New York, Sections 70-72 Legislative Law, Volume 31, McKinney's Consolidated Laws of New York).

Section 72, Sub. 4 of the Legislative Law of the state of New York mandates the Law Revision Commission "To recommend from time to time such changes in the law as it deems necessary * * * to bring the law of this state * * * into harmony with modern conditions" and to report its proceedings annually to the New York State Legislature together with proposed bills to carry out such recommendations.

In recommending the enactment of Section 229 b, Civil Practice Act of the state of New York, the Law Revision Commission reported that it believed unsatisfactory the then existing state of the law which placed a non-resident natural person who does business in New York through an

agent, beyond the jurisdiction of the New York courts (Law Revision Commission, Report, Recommendations and Studies, 1940, p. 110). It supported its recommendation upon the reasoning in *Hess* v. *Pawlowski*, 274 U. S. 352 (1927), *Doherty* v. *Goodman*, 294 U. S. 623 (1935) and in its view the enactment of Section 229 b, Civil Practice Act, was a valid exercise of the police power (Law Revision Commission, Report, Recommendations and Studies, 1940, p. 152).

The courts of Iowa and Pennsylvania have sustained statutes containing provisions for substituted service on non-resident individuals doing business within the state as a valid exercise of the police power (*Stoner* v. *Higginson*, 316 Pa. 481, 175 Atl. 527 (1934); *Davidson* v. *Doherty*, 214 Iowa 739, 241 N. W. 700 (1932)).

Text writers have supported this view, on the ground that a non-resident, by sending his agent into the state to do business there, accepts the benefit of the protection of the laws of that state and should therefore be amenable to the jurisdiction of its courts in litigation connected with such business ((1938) 18 Iowa L. Rev. 257; (1932) 46 Harv. L. Rev. 153; (1932) 18 Va. L. Rev. 896; (1935) 13 N. Y. U. L. Q. Rev. Ill.; (1935) 19 Minn. L. Rev. 805; (1935) 20 Iowa L. Rev. 833; (1935) 48 Harv. L. Rev. 1433; (1935) 14 Tex. L. Rev. 71; Comment, (1936) 45 Yale L. J. 404; Note, (1932) 18 Va. L. Rev. 903).

The trend of the authorities is to sustain the validity of the service of process, if upon compliance with the statutory provisions the defendant will have notice. Section 229 b, Civil Practice Act of the state of New York does not violate the Fourteenth Amendment to the Constitution of the United States, since it contains ample safeguards for the giving of notice to a non-resident defendant who must

receive actual notice of the claim, with ample opportunity to defend the claim (*Wuchter* v. *Pizzutti*, 276 U. S. 13, p. 24 (1928); *Hess* v. *Pawlowski*, 274 U. S. 13, p. 24 (1928); *Hess* v. *Pawlowski*, 274 U. S. 352; *Henry L. Doherty & Co.* v. *Goodman*, 294 U. S. 623 (1935)).

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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